

1                   **BEFORE THE SHORELINES HEARINGS BOARD**  
2                   **STATE OF WASHINGTON**

3       **ELSIE GOOD,**

4                   **Appellant**

5                   **v.**

6       **PACIFIC COUNTY &  
DEPARTMENT OF ECOLOGY,**

7                   **Respondents.**  
8       \_\_\_\_\_

SHB No. 93-7

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND ORDER**

9           This case came before the Shorelines Hearings Board ("Board") on an appeal by Elsie  
10   Good ("Good") of the denial of a Substantial Development/Variance Permit by Pacific County  
11   ("County").

12          A hearing was held on July 19, 1993, in Ocean Park, Pacific County. Board Member  
13   Richard C. Kelley presided for the Board. Witnesses were sworn and gave testimony, exhibits  
14   were introduced, and arguments of counsel were heard. The Board, having considered all of  
15   the record, makes the following

16                   **FINDINGS OF FACT**

17                   **I**

18          Elsie Good is the owner of a parcel of land in Oysterville, an unincorporated area of  
19   Pacific County. On June 4, 1991, Good submitted an application to the County for a  
20   Shoreline Substantial Development Permit/Variance Permit to allow construction of a single  
21   family residence with a septic system for sewage disposal.

22                   **II**

23          On April 17, 1991, Swenson Construction, hired by Good, had applied to Pacific  
24   County for a development permit, which application was later amended on Good's behalf to  
25

1 specify that 1,200 cubic yards of fill would be used, with 250 yards to be from off-site, and  
2 the remaining 950 yards to be moved from one part of the site to the proposed building area  
3

### 4 III

5 On May 8, 1991, the County Health and Human Services Department signed off on an  
6 on-site pressure septic system for the site, specifying the use of public water supply, and  
7 conditioned on the abandonment of an existing well on the adjacent property, which is owned  
8 by Les Driscoll. The permit did not address the appropriateness of the site for a septic system  
9 in terms of shoreline impact, or the location relative to the ordinary high water line. The  
10 permit was not approved by the Planning Department, and thus was never issued.

### 11 IV

12 On April 28, 1992, the County Planning Department issued a SEPA Determination of  
13 Non-Significance for the project.

### 14 V

15 On December 29, 1992, the Pacific County Board of County Commissioners denied  
16 Good's amended application for a Substantial Development Permit/Variance Permit.

### 17 VI

18 The site ranges from 5.9 to 8.7 feet above Mean Sea Level (MSL).

### 19 VII

20 The "ordinary high water mark" as defined by RCW 90.58.030(2)(b), in the  
21 Oysterville area is 8.38 feet above MSL.

### 22 VIII

23 The site lies entirely within the 100-year flood plain, and a major portion of the  
24 proposed development on the site lies waterward of the ordinary high water mark.  
25  
26

IX

The water table at the proposed building site is approximately 4 feet below present ground level.

X

The site is unremarkable in its characteristics, and is comparable to other sites to the north and south along the Willapa Bay side of the Long Beach Peninsula.

XI

The site for which septic system approval was sought lies within 75 feet of the ordinary high water mark, and will not accommodate a septic system drainfield without the addition of fill.

XII

The site is subject to frequent and severe flooding, particularly in the Fall and Winter months. It can be expected to flood to approximately the level of the highest portion of the site, as presently contoured, once in every 1 to 3 years.

XIII

Willapa Bay and its associated wetlands constitute one of the most fragile and important environments in Washington State. The shifting sands, high water table, extensive flood plains, and sensitive animal and plant habitats on the Long Beach Peninsula complicate all County decisions on implementation of the Shoreline Management Act.

XIV

In 1977 J. Arnold Shotwell prepared an extensive study for the County Planning Division on the Willapa Estuary. Much of this study focused on the peculiar and rigorous habitat requirements of oyster cultivation, which is both a major natural resource and an economically, historically and culturally important local industry.

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XV

We find that the protection of water quality, tidelands and other elements of oyster habitat is crucial to both the local and the statewide public interest. Increased wetland development, particularly that involving septic systems, increases the risk of irreparable damage to Willapa Bay.

XVI

The Good site is so situated as to be an accessible and unavoidable precedent for future County decisions on dozens or even hundreds of Willapa Bay wetlands parcels, thus magnifying the likely cumulative effect of its development.

XVII

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Based on the preceding findings, the Board makes the following

CONCLUSIONS OF LAW

I

The Board has jurisdiction in this matter under RCW 43.21B.

II

The Pacific County Shoreline Master Program (SMP) designates the 100-year floodplain as the portion of floodplain constituting wetlands. Pacific Co. SMP 21.03.

III

The Good site lies entirely within the shorelines and associated wetlands of Willapa Bay, a shoreline of statewide significance under RCW 90.58 030(2)(e)(i),(vi) and (f).

IV

Because of the proposed fill, the value of which greatly exceeds \$2,500, the Good project does not meet the single-family residence exemption under RCW90.58.030(3)(e)(vi).

1 Hastings v. Dept. of Ecology & Island County, SHB No. 86-27 (1988). See also Whittle v.  
2 City of Westport and Bowe, SHB No. 81-10 (1981).

3  
4 Even had the project qualified as an exempt single-family residence, it would still have  
5 been subject to the substantive requirements of the County Shoreline Master Program, and  
6 other requirements of County law, including conditions on septic system approval.

7 V

8 The SMP prohibits filling waterward of the ordinary high water mark, i.e., below 8.38  
9 feet MSL, for creation of septic system drainfields. SMP 22.15.

10 VI

11 The SMP prohibits construction of a pressure septic system drainfield within 75 feet of  
12 the ordinary high water mark. SMP 22.14.

13 VII

14 The SMP defines fill as "the placement by man of sediment or other material in an  
15 aquatic area to create new shorelands or on shorelands to raise the elevation of the land.  
16 (emphasis added) SMP 2.54. No distinction is made between fill which originates offsite and  
17 fill which is dug from one part of the site and moved onto another: both are fill.

18 VIII

19 Appellant argues that supplementing the 250 yards of fill from offsite with 950 yards  
20 from the site itself is not 1,200 yards of filling but only 250 yards. We disagree. The effect  
21 of the fill itself, where deposited, is the same; further, the digging of fill material from the  
22 lower portions of the site will destroy tidal vegetation and increase the already serious flooding  
23 problem.

IX

The Shoreline Management Act of 1971, RCW 90.58, requires the County, when adopting its Shoreline Master Program to regulate the use of shorelines of statewide significance, to

*...give preference to uses in the following order of preference which:*

- (1) Recognize and protect the state-wide interest over local interest;*
  - (2) Preserve the natural character of the shoreline;*
  - (3) Result in long term over short term benefit,*
  - (4) Protect the resources and ecology of the shoreline;*
  - (5) Increase public access to publicly owned areas of the shorelines;*
  - (6) Increase recreational opportunities for the public in the shoreline;*
  - (7) Provide for any other element as defined in RCW 90.59.100 deemed appropriate or necessary.*
- RCW 90.58.020*

X

WAC 173.14.150 gives the criteria which must be met by an applicant for a variance permit:

*(3) Variance permits for development that will be located either waterward of the ordinary high water mark (OHWM), as defined in RCW 90.58 030(2)(b), may be authorized provided the applicant can demonstrate all of the following:*

*(a) That the strict application of the bulk, dimensional or performance standards set forth in the applicable master program precludes a reasonable use of the property not otherwise prohibited by the master program;*

*(b) That the proposal is consistent with the criteria established under (2)(b) through (e) of this section; and*

*(c) (not relevant in this case).*

1 (2)(b) through (e) states:

2 *(b) That the hardship .. is specifically related*  
3 *to the property, and is the result of unique conditions*  
4 *.. and the application of the master program, and not*  
5 *for example, from deed restrictions or the appellant's*  
6 *own actions;*

7 *(c) That the design of the project is compatible*  
8 *with other permitted activities in the area and will*  
9 *not cause adverse effects to adjacent properties or the*  
10 *shoreline environment;*

11 *(d) That the requested variance does not*  
12 *constitute a grant of special privilege not enjoyed by*  
13 *the other properties in the area, and is the minimum*  
14 *necessary to afford relief; and*

15 *(e) That the public interest will suffer no*  
16 *substantial detrimental effect. (Emphasis added.)*

17 Additionally, WAC 173-14-150(4) provides

18 *In the granting of all variance permits,*  
19 *consideration shall be given to the cumulative impact*  
20 *of additional requests for like actions in the area...*

## 21 XI

22 We conclude that Good, while required to meet all of the criteria, failed to demonstrate  
23 that her application met any of the above criteria for a variance permit, with the possible  
24 exception of (2)(b).

## 25 XII

26 Good did not prove that the proposed development is the only reasonable use of the  
27 property.

## 28 XIII

29 We conclude that the decision by the County in the case of the Good application to  
30 deny a Substantial Development Permit/Variance Permit was proper, and reasonably necessary  
31 to meet the County's obligation under the Shoreline Management Act to protect a shoreline of  
32 statewide significance.

XIV

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.  
Based on these conclusions, the Board issues the following



BEFORE THE SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON

ELSIE GOOD,

Appellant,

v.

PACIFIC COUNTY and STATE OF  
WASHINGTON, DEPARTMENT OF ECOLOGY,

Respondents.

SHB NO. 93-7

MOTIONS FOR SUMMARY JUDGMENT  
AND PARTIAL SUMMARY JUDGMENT

On June 1, 1993, Appellants filed a Motion for Summary Judgment on the four issues stated in the Prehearing Order of April 6, 1993. On June 17, 1993, Respondent DOE filed a Motion for Partial Summary Judgment.

A summary judgment will be granted only if there is no genuine issue of material facts and the moving party is entitled to judgment as a matter of law.

APPELLANTS MOTION FOR SUMMARY JUDGMENT

Having reviewed the Motions, Responses, and Replies submitted by the parties, the Board finds that, even if all the facts as stated by Appellant were uncontested, the Appellant would not be entitled to summary judgment as a matter of law.

As to issue (1): *Is the proposed development within the jurisdiction of the Shorelines Management Act (90.58 RCW) as defined in the Act?* Appellant seeks summary judgment on the grounds that the applicant/appellant's project is the construction of a single family

MOTIONS FOR SUMMARY JUDGMENT-  
AND PARTIAL SUMMARY JUDGMENT

1 Not only must Summary Judgment be denied for the same reasons as  
2 stated above for Issue (1), but, furthermore, this Board does not have  
3 the jurisdiction to declare, as Appellant requests, that a Shoreline  
4 Master Program provision is inconsistent, on its face, with the  
5 Shoreline Management Act. and is, therefore, *ultra vires*. . (Stump v.  
6 Kitsap County, SHB No. 84-53; Tulalip Tribes v. Snohomish County, SHB  
7 No. 87-5; Yule v. Yarrow Point, SHB No. 87-22.)

8 As to Legal Issues (3) and (4), Appellant's Motion must fail for  
9 the same reasons noted under Issue (1).

10 In summary, Appellant's Motion for Summary Judgment is denied as  
11 to all four Prehearing Order Issues.

12 RESPONDENT DOE'S MOTION FOR PARTIAL SUMMARY JUDGMENT

13 For the same reasons stated above in the denial of Appellant's  
14 Motion, Respondent DOE's Motion for Partial Summary Judgment is  
15 granted as to Issues (1) and (2) of the Prehearing Order.

16 HEARING

17 The remaining issues in the Prehearing Order which will be heard  
18 on Monday, July 19, 1993, will be:

19 (3) Under the terms of the Pacific County Shoreline Master  
20 Program, does this proposed project require a variance,  
21 and, if so, does the proposed project satisfy the variance  
22 criteria of the County's Master Program?,

23 (4) Is the proposed development within a 100 year flood  
24 plain, a flood hazard area, or associated wetlands, and, if

25  
26 MOTIONS FOR SUMMARY JUDGMENT-  
27 AND PARTIAL SUMMARY JUDGMENT

1 so, is there sufficient dry upland on the parcel to permit  
2 construction of an on-site septic system?

3 SO ORDERED this 14<sup>th</sup> day of July, 1993.


4  
5 SHORELINES HEARINGS BOARD

6   
7 HAROLD S. ZIMMERMAN, Chairman

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9 ROBERT V. JENSEN, Member

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11 RICHARD C. KELLEY, Member

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13 BOBBI KREBS-McMULLEN, Member

14 PRESIDING OFFICER:   
15 JOHN H. BUCKWALTER  
16 Administrative Appeals Judge

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26 MOTIONS FOR SUMMARY JUDGMENT-  
27 AND PARTIAL SUMMARY JUDGMENT